

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HEZEKIAH BERNARD DRAYTON,

Plaintiff,

v.

UNITED STATES,

Defendant.

Case No. EDCV 15-1368 DOC(JC)
ORDER DISMISSING COMPLAINT
WITH LEAVE TO AMEND

I. BACKGROUND AND SUMMARY

On July 8, 2015, plaintiff Hezekiah Bernard Drayton (“plaintiff”), who is currently in custody at the United States Penitentiary at Hazelton, West Virginia (“USP Hazelton”) and has been granted leave to proceed *in forma pauperis*, filed a *pro se* Civil Rights Complaint (“Complaint”)¹ with attached exhibits (“Complaint Exhibits”) purportedly raising claims under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) and the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* (“FTCA”) against a single defendant, the United

¹Since internal page numbering for the Complaint is inconsistent, for ease of reference the Court cites to the Complaint pages in the order in which they appear, beginning with page one.

1 States. (Complaint at 1, 4). Very liberally construed, the Complaint appears to seek
 2 monetary relief based on the alleged negligence of multiple officials with USP
 3 Hazelton and with the United States Penitentiary at Victorville, California (“USP
 4 Victorville”) where plaintiff was previously housed. (Complaint at 6-8).

5 Because the Complaint is deficient in multiple respects, including those
 6 detailed below, it is dismissed with leave to amend.

7 **II. GOVERNING LEGAL STANDARDS**

8 Federal courts are courts of limited jurisdiction. Kokkonen v. Guardian Life
 9 Insurance Co., 511 U.S. 375, 377 (1994). The Court may raise the absence of
 10 subject matter jurisdiction *sua sponte*, and must dismiss an action if it determines at
 11 any time that it lacks subject matter jurisdiction. See Fed. R. Civ. P. 12(h)(3) (if
 12 court determines at any time that it lacks subject matter jurisdiction, it must dismiss
 13 action); Steel v. Citizens for a Better Environment, 523 U.S. 83, 94-95 (1998)
 14 (court bound to ask and answer for itself, whether it has jurisdiction, even when not
 15 otherwise suggested); Fiedler v. Clark, 714 F.2d 77, 78 (9th Cir. 1983) (federal
 16 court may dismiss *sua sponte* if jurisdiction lacking).

17 Further, as plaintiff is a prisoner proceeding *in forma pauperis* on a civil
 18 rights complaint against governmental defendants, the Court must screen the
 19 Complaint, and is required to dismiss the case at any time it concludes the action is
 20 frivolous or malicious, fails to state a claim on which relief may be granted, or
 21 seeks monetary relief against a defendant who is immune from such relief. See
 22 28 U.S.C. §§ 1915(e)(2)(B), 1915A; 42 U.S.C. § 1997e(c).

23 In determining whether a complaint fails to state a viable claim for purposes
 24 of screening, the Court applies the same pleading standard from Rule 8 of the
 25 Federal Rules of Civil Procedure (“Rule 8”) as it would when evaluating a motion
 26 to dismiss under Federal Rule of Civil Procedure 12(b)(6). See Wilhelm v. Rotman,
 27 680 F.3d 1113, 1121 (9th Cir. 2012) (citations omitted). Under Rule 8, a complaint
 28 must contain a “short and plain statement of the claim showing that the pleader is

1 entitled to relief.” Fed. R. Civ. P. 8(a)(2). While Rule 8 does not require detailed
 2 factual allegations, a complaint must contain “more than an unadorned, the-
 3 defendant-unlawfully-harmed-me accusation.” Ashcroft v. Iqbal, 556 U.S. 662, 678
 4 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007))
 5 (quotation marks omitted). “[W]ell-pleaded factual allegations” in a complaint are
 6 presumed true, while “[t]hreadbare recitals of the elements of a cause of action”
 7 (*i.e.*, legal conclusions) and “legal conclusions couched as a factual allegation” are
 8 not. Id. (citation and quotation marks omitted).

9 Thus, to survive screening, a civil rights complaint must “contain sufficient
 10 factual matter, accepted as true, to state a claim to relief that is plausible on its
 11 face.” Nordstrom v. Ryan, 762 F.3d 903, 908 (9th Cir. 2014) (citations and
 12 quotation marks omitted). A claim is “plausible” when the facts alleged in the
 13 complaint would support a reasonable inference that the plaintiff is entitled to relief
 14 from a specific defendant for specific misconduct. Iqbal, 556 U.S. at 678 (citation
 15 omitted). Allegations that are “merely consistent with” a defendant’s liability, or
 16 reflect only “the mere possibility of misconduct” do not “show[] that the pleader is
 17 entitled to relief” (as required by Fed. R. Civ. P. 8(a)(2)), and thus are insufficient
 18 to state a claim that is “plausible on its face.” Id. at 678-79 (citations and quotation
 19 marks omitted).

20 *Pro se* complaints in civil rights cases are liberally construed to give
 21 plaintiffs “the benefit of any doubt.” Akhtar v. Mesa, 698 F.3d 1202, 1212 (9th Cir.
 22 2012) (citation and internal quotation marks omitted). If a *pro se* complaint is
 23 dismissed for failure to state a claim, the court must “freely grant leave to amend” if
 24 it is “at all possible” that the plaintiff could correct pleading deficiencies by alleging
 25 different or new facts. Cafasso v. General Dynamics C4 Systems, Inc., 637 F.3d
 26 1047, 1058 (9th Cir. 2011) (citation omitted); Lopez v. Smith, 203 F.3d 1122,
 27 1126-30 (9th Cir. 2000) (en banc) (citation omitted).

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3 **III. THE COMPLAINT**

4 Liberally construed, the Complaint essentially alleges the following:

5 On April 22, 2012, while plaintiff was an inmate at USP Victorville, Officer
6 S. Torres escorted plaintiff from a special housing unit to an outside appointment
7 while plaintiff was in “full restraints.” (Complaint at 6). Officer Torres failed to
8 have a second officer with him while escorting plaintiff, which was a violation of
9 USP Victorville rules. (Complaint at 6). Operation Lieutenant Patterson identified
10 plaintiff “to leave,” but “did nothing about providing a second officer to help
11 [Officer] Torres escort plaintiff.” (Complaint at 6). As a result, plaintiff tripped
12 and fell face down on the ground, which caused plaintiff to sustain injuries to his
13 face, shoulders, arms, and neck. (Complaint at 6-7). Thereafter Lieutenant
14 Patterson still did nothing to provide a second officer to help Officer Torres escort
15 plaintiff. (Complaint at 6-7).

16 In December 2012, Dr. Ross Quinn had plaintiff’s neck x-rayed, which
17 revealed a bump on plaintiff’s neck. (Complaint at 7). From December 2012 to
18 July 23, 2013, Dr. Quinn failed to provide reasonable care to plaintiff for his neck
19 injury, which aggravated plaintiff’s condition, and caused plaintiff to suffer
20 additional pain. (Complaint at 7).

21 In December 2012, Dr. Angel Ortiz reviewed plaintiff’s x-ray with Dr.
22 Quinn, saw the bump on plaintiff’s neck, but failed to provide plaintiff with
23 reasonable care for his neck condition. (Complaint at 7). As a result, plaintiff
24 suffered additional pain and injury. (Complaint at 7).

25 On February 13, 2013, Dr. Jesus Fernandez claimed that he ordered an MRI
26 to evaluate plaintiff’s April 22, 2012 spine injury, but as of July 23, 2013, no MRI
27 had been performed. (Complaint at 7). As a result, plaintiff’s neck condition was
28 aggravated and plaintiff suffered additional pain. (Complaint at 7).

1 On July 23, 2013, plaintiff was transferred from USP Victorville to USP
2 Hazelton. (Complaint at 7).

3 On February 12, 2014, Dr. Chris Vasilakis sent a request to Dr. Gregory S.
4 Mims, III to provide plaintiff with a stronger medication for his pain, and to have
5 plaintiff evaluated for possible spine surgery. (Complaint at 7). As of the date the
6 Complaint was drafted, Dr. Mims had not complied with Dr. Vasilakis' request.
7 (Complaint at 7-8). Dr. Mims failed to provide reasonable care for plaintiff's neck
8 injury. (Complaint at 8). As a result, plaintiff's neck condition was aggravated and
9 plaintiff suffered additional pain. (Complaint at 7-8).

10 The Complaint alleges that the foregoing violated plaintiff's rights under the
11 FTCA. (Complaint at 6) (citing 28 U.S.C. §§ 1346(b), 2671 *et seq.*).

12 **IV. DISCUSSION**

13 First, to the extent the Complaint against the United States is predicated on
14 Bivens, it fails to state a claim as a matter of law and must be dismissed. To state a
15 claim for relief under Bivens, a plaintiff must allege that "a federal officer deprived
16 him of his constitutional rights." Serra v. Lappin, 600 F.3d 1191, 1200 (9th Cir.
17 2010) (citation omitted). A plaintiff may not maintain a Bivens action against the
18 United States or its agencies. See Federal Deposit Insurance Corp. v. Meyer, 510
19 U.S. 471, 484-85 (1993). The United States may be sued only to the extent that it
20 has waived sovereign immunity and expressly consented to suit. See id. at 475
21 (1993); Gilbert v. DaGrossa, 756 F.2d 1455, 1458 (9th Cir. 1985). The United
22 States has not waived sovereign immunity with respect to constitutional claims.
23 Rivera v. United States, 924 F.2d 948, 951 (9th Cir. 1991).

24 Second, to the extent the Complaint attempts to state a negligence claim
25 against any of the mentioned individual actors, it likewise fails to state a claim
26 under Bivens as a Bivens action may only be brought against a responsible federal
27 official in his or her individual capacity for money damages predicated on
28 *constitutional* violations, not negligence. See Serra, 600 F.3d 1191, 1200 (9th Cir.

2010) (“To state a claim for relief under *Bivens*, a plaintiff must allege that a federal officer deprived him of his constitutional rights.”) (citation omitted); see also *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (“Medical malpractice does not become a constitutional violation merely because the victim is a prisoner.”); *O’Neal v. Eu*, 866 F.2d 314, 314 (9th Cir.) (plaintiff must plead more than merely negligent act by federal official in order to state colorable claim under *Bivens*), cert. denied, 492 U.S. 909 (1989); *Hutchinson v. United States*, 838 F.2d 390, 394 (9th Cir. 1988) (“mere negligence” insufficient to establish constitutional violation) (citation omitted).

Third, to the extent the Complaint asserts an FTCA claim against the United States, it must be dismissed because it fails to allege compliance with the FTCA’s jurisdictional administrative exhaustion requirement. A federal court does not have subject matter jurisdiction over an FTCA claim unless the plaintiff first presented the underlying tort claim to the “appropriate Federal agency” and the claim was “finally denied” by the agency.² See 28 U.S.C. § 2675(a) (stating same and noting that failure of agency to make final disposition of claim within sixth months after filing may be deemed final denial of claim); McNeil v. United States, 508 U.S. 106,

²Exhaustion under the FTCA is distinct from exhaustion under the Prison Litigation Reform Act (“PLRA”) and exhaustion of a claim under the latter does not constitute exhaustion under the former. See Champion v. Smith, 2012 WL 930858, *2 (E.D. Cal. Mar. 19, 2012) (“[T]he exhaustion requirements under the PLRA and the Federal Tort Claims Act . . . are separate and distinct, and the satisfaction of one does not constitute satisfaction[] of the other.”) (citations and internal quotation marks omitted); Walker v. United States, 2009 WL 3011626, *4 (E.D. Cal. Sep. 17, 2009) (“[E]xhaustion of FTCA claims is not governed by the PLRA.”); Smith v. United States, 2011 WL 4591971, *4 (E.D. Ky. Sept. 30, 2011) (“The FTCA, which concerns both prisoners and non-prisoners, has its own exhaustion process which is completely separate from and independent of the BOP’s four-step administrative process . . . that an inmate must follow to exhaust a *Bivens* claim.”). Here, it appears from the Complaint Exhibits that plaintiff at least attempted to exhaust his claims under the PLRA. However, notwithstanding the fact that one Complaint Exhibit reflects that a BOP official advised plaintiff that “a tort claim” was to be “filed with the Region on Form SF-95,” and that such BOP official supplied plaintiff with a copy of such pertinent form, there is no indication that plaintiff completed such form or otherwise exhausted his claims under the FTCA.

1 111-13 (1993) (strictly construing administrative exhaustion requirement in
 2 28 U.S.C. § 2675(a) and holding that FTCA action filed before exhaustion
 3 completed could not proceed in district court); Brady v. United States, 211 F.3d
 4 499, 502-03 (9th Cir. 2000) (administrative exhaustion requirement in 28 U.S.C.
 5 § 2675(a) is jurisdictional), cert. denied, 531 U.S. 1037 (2000); cf. United States v.
 6 Kwai Fun Wong, 135 S. Ct. 1625, 1632-33 (FTCA statute of limitations contained
 7 in 28 U.S.C. § 2401(b) *not* jurisdictional); see also 28 C.F.R. §§ 543.30-32 (setting
 8 forth procedures for presenting FTCA claims to BOP). A plaintiff has the burden to
 9 plead and prove compliance with the FTCA administrative claim requirements.
 10 See, e.g., Gillespie v. Civiletti, 629 F.2d 637, 640 (9th Cir. 1980) (administrative
 11 claim presentation is jurisdictional prerequisite to bringing of suit under FTCA and
 12 as such, should be affirmatively alleged in complaint; district court may dismiss
 13 complaint for failure to allege such jurisdictional prerequisite); Bruce v. United
 14 States, 621 F.2d 914, 918 (8th Cir. 1980) (district court lacked subject matter
 15 jurisdiction over FTCA claim because plaintiff “failed to allege compliance with the
 16 [FTCA] administrative claim procedure set forth in 28 U.S.C. [§] 2675”); Franklin
 17 v. United States, 2013 WL 2902844, *2 (E.D. Cal. June 13, 2013) (dismissing
 18 FTCA claim where *pro se* plaintiff in BOP custody “failed to allege facts sufficient
 19 to satisfy the Court that he [] complied with the exhaustion requirements of the
 20 FTCA [under 28 U.S.C. § 2675”); Connors v. Heywright, 2003 WL 21087886, *4
 21 (S.D.N.Y. May 12, 2003) (dismissing FTCA claim without prejudice where
 22 “complaint [did] not allege compliance with the [administrative exhaustion]
 23 requirements of the FTCA”).

24 V. ORDERS

25 In light of the foregoing, IT IS HEREBY ORDERED:

26 1. The Complaint is dismissed with leave to amend. If plaintiff intends
 27 to pursue this matter, he shall file a First Amended Complaint within fourteen (14)
 28 days of the entry of this Order which cures the pleading defects set forth herein. If,

in light of the contents of this Order, plaintiff elects not to proceed with this action, he may expedite matters by signing and returning the attached Notice of Dismissal by the foregoing deadline which will result in the voluntary dismissal of this action without prejudice.

2. Plaintiff is cautioned that, absent further order of the Court, plaintiff's failure timely to file a First Amended Complaint or Notice of Dismissal, may result in the dismissal of this action with or without prejudice on the grounds set forth above and/or for failure diligently to prosecute.

IT IS SO ORDERED.

DATED: 09/14/15

David O. Carter

HONORABLE DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

Attachment